In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1298

HERMAN J. HEIDRICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted on his plea of nolo contendere to two counts of an information[1] (R. 17). One count charged him with having willfully and knowingly subscribed to a partnership return for the fiscal year ending August 31, 1958, under penalties of perjury, in which the income of the partnership was understated by approximately $450,000, in

[1] Petitioner waived his right to prosecution by indictment (R. 1).

violation of § 7206(1), Internal Revenue Code of 1954 (R. 2-3); the other count charged him with having willfully attempted to evade and defeat more than $100,000 of his and his wife's income taxes for the year 1958, in violation of 1954 Code § 7201 (R. 4). The district court sentenced him to three months' imprisonment, to be followed by nine months' probation, and a $15,000 fine (R. 17-19). After several hearings at which petitioner urged that the imprisonment portion of his sentence be suspended entirely because of an alleged deleterious effect it would have on his wife's health, the court reduced the period of incarceration to sixty days (R. 22-45, 58-103).

There is no merit to petitioner's contention (Pet. 4-5) that the trial judge did not exercise his discretion in imposing sentence. Although it is true that the lower court stated at a hearing that he and his fellow judges had a general policy of requiring imprisonment in tax evasion cases (R. 100), the record clearly shows that the instant sentence was imposed on an individualized basis in accordance with this Court's holding in *Burns* v. *United States*, 287 U.S. 216, 220. For example, the judge stated that he had imposed what he considered to be a very lenient sentence, considering the large amount of taxes which petitioner and his sons had attempted to evade (R. 69-70). Moreover, after hearings on petitioner's motions, the court did reduce the period of imprisonment from ninety days to sixty days (R. 44-45).

Finally, it is clear that Judge Choate (who sentenced petitioner) does not feel himself inflexibly bound by a policy of giving jail sentences to all defendants convicted of tax evasion, for he gave probation to one of petitioner's codefendants, Fred W. Feuerbacher.[2] Petitioner's assertion (Pet. 3) that this policy is limited only to "principals" has no support in the record, and is merely an attempt to distort what is obviously a general policy into an inflexible rule against granting probation of the type which was struck down in *United States* v. *Wiley*, 267 F. 2d 453 (C.A. 7).[3]

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[2] In his dissenting opinion in the court of appeals, Judge Godbold stated that the record did not show whether Judge Choate sentenced Mr. Feuerbacher as well as petitioner (Pet. App. 6). Appendix 1 to the government's brief in the court of appeals (a copy of which has been lodged with the Clerk of this Court) is a reproduction of that judgment which is signed by Judge Choate.

[3] In the *Wiley* case the district judge had stated that he would not consider granting probation in any case where the defendant had insisted on a trial. In addition, the court of appeals was disturbed by the fact that Wiley, an accessory, with no prior record, was sentenced to three years in prison, whereas McGhee, the ringleader, who had four previous felony convictions and had pled guilty, was given a sentence of only two years; indeed, after the district judge on remand sentenced Wiley to three years, the court of appeals reversed again for this very reason. *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7). In the instant case, petitioner was sentenced to sixty days for understating partnership income by $450,000, and attempting to evade and defeat more than $100,000 of his personal taxes.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

MAY 1967.

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